AMOCO PRODUCTION CO.
(On Reconsideration)

IBLA 75-340 Decided May 9, 1978

Reconsideration of decision affirming Geological Survey decision requiring payment of additional royalty from Federal leases subject to the Little Buffalo Basin Frontier Sand Gas Unit, I-Sec. No. 225.

Amoco Production Company, 24 IBLA 227 (1976), vacated.

1. Oil and Gas Leases: Unit and Cooperative Agreements

The amendment to 30 U.S.C. § 226(j) by the Mineral Leasing Act Amendments of 1960 does not require segregation into separate leases of any lease committed before July 29, 1954, to a unit agreement which covers land within and land outside the area covered by the plan.

2. Oil and Gas Leases: Royalties -- Oil and Gas Leases: Unit and Cooperative Agreements

Where a unit agreement provides that royalty on production shall be paid at the rate set forth in the individual lease terms, and the lease provides that no royalty shall be due on gas used for production purposes, it is proper to deduct the amount of gas used for production purposes on a lease from the gross allocation of gas to that lease before making the computation of royalty due to the United States.

APPEARANCES: Frank Houck, Esq., Denver, Colorado, for Amoco Production Co.; C. M. Peterson, Esq., Denver, Colorado, for the amicus curiae, Rocky Mountain Oil and Gas Association; James A. Holtcamp, Esq., Office of the Solicitor, for the Geological Survey.

35 IBLA 43

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Amoco Production Company petitioned for reconsideration of the Board's decision, Amoco Production Company, 24 IBLA 227 (1976), which affirmed decision GS-65-O&G, of the Acting Director, Geological Survey, requiring Amoco to submit corrected reports of gas production from Federal leases subject to the Little Buffalo Basin Frontier Gas Sand Unit Agreement, I-Sec. No. 225 (hereinafter Frontier Gas Agreement), together with payment of additional royalty.

The Frontier Gas Agreement was approved by the Secretary of the Interior on January 6, 1931, pursuant to the Act of July 3, 1930, 46 Stat. 1097. 1/ Federal oil and gas leases Cheyenne (Ch) 044187, Ch 045633, Ch 046855, Ch 052234, Ch 052235, and Ch 052236 were committed to the unit agreement for the purpose of developing gas in the Frontier series of formations only. The unit agreement established a sliding scale royalty for gas extracted and made no reference to gas used for production purposes. The terms of the Federal leases involved provide that no royalty shall be payable on oil or gas used for production purposes on the leased land or unavoidably lost.

The Act of March 4, 1931, 46 Stat. 1253, provided that any lease that has become subject to a unit plan of development shall continue in force beyond the initial 20-year term of the lease until termination of the unit plan. Because the Frontier Gas Agreement covered only gas in a single formation, Amoco requested clarification of the lease term, and the Assistant Secretary replied in a letter dated August 3, 1940:

> No leases have ever been granted for the same tract of land which provided for the development of the oil deposits as distinguished from the gas deposits, or for the development of one formation as distinguished from another formation.
>
> It follows from the foregoing that the leases committed to the unit plan for the Little Buffalo Basin field will be considered as extended beyond their twenty-year period for so long as the unit plan remains in effect, and that operations may be conducted in all formations and sands and for the development of oil or gas, except as to the formations known as the Frontier series, independently of the terms and provisions of the plan.

1/ The Act of July 3, 1930, was temporary legislation, expiring January 31, 1931. Authority to create unit agreements was reenacted in permanent form in the Act of March 4, 1931, 46 Stat. 1523, 1525, 30 U.S.C. § 226(j) (1970).

Thereafter, on September 7, 1943, the Department approved the Little Buffalo Basin Deep Sand Unit Agreement, I-Sec. No. 365 (hereinafter Deep Sand Agreement). This agreement effectively unitized all hydrocarbon substances and production from all formations in the unit area, within the Federal leases in question, but expressly excluded the substances in the Frontier series of formations unitized in the Frontier Gas Agreement. The Deep Sand Agreement provided that the Frontier Gas Agreement could be merged into the Deep Sand Agreement as a separate participating area, but that such a course would not change or alter the method of allocation of gas produced under the gas unit. However, there has never been a request for such merger so the Frontier Gas Agreement and the Deep Sand Agreement each remains as a separate unit agreement, albeit affecting the same Federal leases, and with the surface area of the Frontier Gas Agreement being wholly within the surface area of the Deep Sand Agreement.

The Mineral Leasing Act Revision of 1960, of September 2, 1960, 74 Stat. 782, 784, 30 U.S.C. § 226(j) (1970), required Federal oil and gas leases theretofore or thereafter partly committed to an approved unit agreement to be segregated into two leases, one covering the lands committed and one the lands not so committed.

In Amoco Production Company, supra, this Board interpreted 30 U.S.C. § 226(j) as requiring segregation of Federal oil and gas leases where only part of the leased land was committed to a unit plan of development, whether the partial commitment was by discrete subdivisions including all depths and horizons, or by specific horizons only.

As the Federal leases in issue were first committed in part to the Frontier Gas Agreement (Frontier formation only), and later committed in remaining part to the Deep Sand Agreement, the Board's decision held that each lease originally committed to the Frontier Gas Agreement was, by law, segregated into discrete leases, one covering only the lands and interest committed to the Frontier Gas Agreement, and one covering the remainder of the original leases and interests now committed to the Deep Sand Agreement.

Following this holding, the Board further held that gas produced under the Frontier Gas Agreement necessarily crossed a lease boundary when it went to production purposes within the Deep Sand Agreement so the demand by Geological Survey for corrected production reports and payment of additional royalty was proper.

Amoco petitioned for reconsideration, alleging error in the Board's decision:

1. The decision failed to consider the provisions of section 8 of the Mineral Leasing Act Revision of 1960;

2. The decision failed to consider the provisions of 43 CFR 3107.4-3;

3. The decision misinterpreted and misapplied applicable provisions of the Mineral Leasing Act of February 25, 1920, as amended by the Acts of July 29, 1954, 68 Stat. 583, and of September 2, 1960, 74 Stat. 781;

4. The decision misinterpreted and misapplied the provisions of the Frontier Gas Agreement plan of development, dated December 3, 1930, I-Sec. No. 225.

By order of June 9, 1976, the Board suspended its decision in Amoco Production Company, supra, and granted Amoco's motion for reconsideration. Briefs were requested from Amoco and from the Department's Solicitor on behalf of Geological Survey. Thereafter, Rocky Mountain Oil and Gas Association requested and was granted permission to file a brief amicus curiae.

The Board then invited oral argument and on September 28, 1976, heard such argument from Frank Houck, Esq., Denver, Colorado, representing Amoco, from C. M. Peterson, Esq., Denver, Colorado, representing the intervenor, Rocky Mountain Oil and Gas Association, and from James A. Holtkamp, Esq., Office of the Solicitor, Washington, D.C., representing Geological Survey.

Section 8 of the Mineral Leasing Act Revision of 1960, 74 Stat. 791, provides that no amendment made by this Act shall affect any valid right in existence on the effective date of the Mineral Leasing Act Revision of 1960 (MLAR 1960). It was approved September 2, 1960.

Amoco argued that section 8 was a saving clause to protect rights in existence in all preexisting leases as of September 2, 1960, and that the language is nugatory if "heretofore" as included in section 2 of the Act, amending section 17(j) of the Mineral Leasing Act, 30 U.S.C. § 226(j) (1970): "Any lease heretofore or hereafter committed to any such [unit] plan * * * shall be segregated into separate leases" may be interpreted as extending back to February 25, 1920, the date of the original Mineral Leasing Act. 30 U.S.C. § 181 (1970). Amoco argued that "heretofore" in the Mineral Leasing Act Revision extended back only to July 29, 1954, the date of enactment of P.L. 83-555, which amended section 17 of the Mineral Leasing Act to require segregation of leases committed in part to unit agreements thereafter. Amoco contended the Act was prospective in application only, and cited 43 CFR 3107.4-3 in support: "Any lease committed after July 29, 1954, to such a [unit] plan, which covers land within and lands outside the area covered by the plan, shall be segregated, as of the effective date of unitization, into separate leases * * *. The Solicitor argued that "heretofore" surely meant

more than 1954, but conceded the legislative history is barren as to any explanation why the word was introduced into the section. He suggested that all language in statutes must be given consideration.

In the absence of specific Congressional intent for inclusion of "heretofore" into the amended section 17(j) of the Mineral Leasing Act, we are entitled to give much weight to contemporary interpretation given to MLAR 1960 within the Department. In a memorandum dated December 2, 1960, distributed to all BLM area and State Offices, on the subject "Segregation of Leases Committed in Part to Unit Plans," the Director, Bureau of Land Management, defined "heretofore" as used in MLAR 1960 as referring only to leases which were partly committed to unit plans in accordance with the Mineral Leasing Act of 1920, as amended, as it existed prior to the 1960 amendment. The Director stated:

> The word "heretofore" as used in this provision of the act refers to leases which were partly committed to unit plans in accordance with the 1920 Mineral Leasing Act as it existed prior to the 1960 amendment. As to your inquiry this means the 1920 Mineral Leasing Act as amended by section 4 of Public Law 555. Section 4 of that Act provided for segregation of leases partly committed to a unit plan only after the effective date of the act.
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> The House bill (H.R. 10455, 86th Congress) which became P.L. 86-705 (The Mineral Leasing Act Revision of 1960) originally followed the language of P.L. 555 in its use of the word "hereafter" and the words "heretofore or" were added when the bill went to the conference committee of the House and Senate. The conference report, dated August 23, 1960, stated that this section was adopted by the conference committee "with minor technical changes" (House Report No. 2135, 86th Congress, page 12). In view thereof the addition of the words "heretofore or" by the committee should be construed as a minor technical change rather than a change of substance. To construe this provision as requiring the segregation of leases which were partially committed to unit plans prior to the act of July 29, 1954, would amount to a major substantive change. Such an interpretation would require a retroactive change in the terms of many old leases and deprive lessees of the substantive property rights which they had long previously acquired and enjoyed over the years since Federal leases were first unitized. Moreover, such a construction should probably be held to be an unconstitutional deprivation of property and contract rights in any case where retroactive segregation of leases would require the

> retroactive termination of valuable non-unitized portions of leases whose terms have continued by reason of production on the unitized portion.
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> The foregoing views are further supported by section 8 of P.L. 86-705 which reads as follows:
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> > "Section 8. No amendment made by this Act shall affect any valid right in existence on the effective date of the Mineral Leasing Act Revision of 1960."
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> Thus, Congress has itself expressly precluded an interpretation of the act which would adversely affect any valid rights arising under leases issued and partially committed to unit areas prior to the amendatory act of July 29, 1954.
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> In view of the above, the Mineral Leasing Act Revision of 1960 does not contain authority to segregate leases committed in part to a unit plan prior to the date of enactment of Public Law 555 on July 29, 1954.

It is reasonable to assume that the Congress was not unaware of this interpretation and practice during the years following enactment of MLAR 1960, and by its inaction of further specific legislation directly on point, acquiesced in the interpretation that segregation for partial commitment to a unit agreement was prospective only since 1954.

Although the dictionary definitions of "heretofore" include "up to this time," "hitherto," "in time past," "previously," the contemporary interpretation that Congress did not intend to apply mandatory segregation of leases partly committed to approved unit agreements unless such unit agreement was approved subsequent to July 29, 1954, is entitled to great weight in determining the extent to which the amendatory language must be put. And the Congress surely has been aware of this interpretation imposed by BLM since MLAR 1960.

The Department's regulations continue to express this interpretation of the Act. The pertinent regulation, 43 CFR 192.122(c), was amended by Circular 1894, December 29, 1954, 19 FR 9278, to read as follows:

> (c) Any lease committed after July 29, 1954 to such a plan, which covers lands within and lands outside the area covered by the plan, shall be segregated, as of the effective date of unitization, into separate leases; one covering the lands committed to the plan and the other the lands not so committed.

In the present codification, this exact language is now found at 43 CFR 3107.4-3 (1976).

[1] Accordingly, we hold that BLM is correct in its practice of effecting segregation of leases partly committed to a unit agreement, 30 U.S.C. § 226(j), 43 CFR 3107.4-3, only if the unit agreement was approved after July 29, 1954, that leases partly committed to unit agreements before July 29, 1954, were "valid rights" protected by section 8 of MLAR 1960, and that the terms of the Federal leases involved prevail relatives to the royalty waiver for oil and gas used for production purposes within the boundaries of the leasehold.

[2] Specifically, in the Frontier Gas Agreement, the allocation of gas production of each lease on a pro rata basis pursuant to Article III of the Unit Agreement established the amount of gas for which royalty is to be paid, and Article VII of the Unit Agreement provides that royalty to the United States shall be at the rate set forth in the lease terms. As each Federal lease committed to the Unit Agreement provides that no royalty shall be due for gas used for production purposes or unavoidably lost, we hold that where gas was used for production purposes within the leased area, that amount of gas may be deducted from the gross allocation of gas to that lease before computation of royalty due to the United States is made. This holding is expressly directed to the situation extant at the time of the decision GS-65-O&G, issued December 19, 1974, and the subject of this appeal.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the Decision of this Board, Amoco Production Company, 24 IBLA 227 (1976), is vacated, and the decision Amoco Production Company, GS-65 O&G, of the Acting Director, Geological Survey, is reversed.

In light of our holding in this case, it is not necessary to reach the question raised by the amicus, RMOGA, relating to horizontal segregation of an oil and gas lease because of commitment to an approved Unit Agreement involving only specific formations, as in the LBB Frontier Gas Unit. The earlier decision of this Board, Buttes Gas & Oil Co., 13 IBLA 125 (1973), dealing with the question of horizontal segregation remains intact.

We do not express any opinion as to the effect of the Notice to Lessees (NTL-4) issued November 15, 1974, by the Geological Survey

upon the leases partly committed to the Little Buffalo Basin Gas Unit and the Little Buffalo Basin Deep Sand Unit.

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Douglas E. Henriques
Administrative Judge

We concur:

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Frederick Fishman
Administrative Judge

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Martin Ritvo
Administrative Judge